NO. 2054

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES A. HICKENLOOPER,

Appellant,

vs.

T. H. CHRISTY, THE CRYSTAL SPRINGS INVESTMENT COMPANY, a corporation, W. J. D'ARCY, Receiver of the said The Crystal Springs Investment Company, Limited, a corporation.

Appellees.

BRIEF FOR APPELLEES

HANSBROUGH & GAGON,
JOHN W. JONES,
Attorneys for Appellee

Filed 1912

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STATEMENT OF THE CASE

About July 8, 1907, one Thomas G. Clegg and Rachel A. Clegg, made and delivered to one S. J. Rich, their promissory note secured by a mortgage for the sum of $1400.00, on certain real property which is described in Exhibit "B" (pages 10 to 12 transcript), and that sometime thereafter the said Clegg and wife sold the real estate described in said mortgage to one of the defendants and appellees, The Crystal Springs Investment Company, Limited, a corporation, subject to said mortgage; that on the 25th day of September, 1908, the appellee, The Crystal Springs Investment Company, Limited, made and delivered its promissory note for the sum

of $2,080.00, and delivered said note and a mortgage to secure the same on the same real property to Thomas G. Clegg; that some time thereafter the said note and mortgage for $2,080.00 was by said Clegg assigned and sold to the Brown-Hart Company, a corporation, and to appellee T. H. Christy, and afterwards the interest owned by the Brown-Hart Company was by it sold and assigned to the said Christy. That neither the said Crystal Springs Investment Company, nor Thomas G. Clegg, nor any one else paid either of said mortgages, and that a suit was brought in the State Court to foreclose the mortgage described in the bill of complaint as exhibit "B", and the same was regularly foreclosed by decree of the Court about June 30, 1908, and that the mortgage for $2,080.00 given by the Crystal Springs Investment Company to Thomas G. Clegg and so assigned to T. H. Christy, was foreclosed in the State Court about the year 1910, (pages 120-121 transcript); that in the meantime, the appellee Crystal Springs Investment Company went into the hands of a receiver and W. J. D'Arcy was appointed as such receiver (pages 19-24 transcript); and that upon the appointment of the receiver he petitioned the Court to permit him to borrow a sum sufficient to redeem from the foreclosure sale on the mortgage known as the S. J. Rich mortgage, which is fully set out in complainant's exhibit "D" (page 19-22 transcript); that on the 9th of July 1909, the Judge of the District Court of the Sixth Judicial District of Idaho, in and for Bingham County, made an order directing W. J. D'Arcy to borrow a sum sufficient to redeem from said mortgage foreclosure sale of $1911.60, the same not exceeding one-half of the value of the property and the amount to be borrowed not to exceed $2500.00, and the said receiver was by said order directed to execute a mortgage on the property so redeemed to the person from whom he borrowed

the money for said purpose to bear interest at the rate of twelve per cent per annum, (pages 22 to 24 transcript). That pursuant to the order of the Court the said receiver W. J. D'Arcy borrowed from the complainant on the 30th day of June, 1909, the sum of $2,012.76 with which to redeem said property from said mortgage sale (page 7 transcript); and that at said time said receiver offered to give complainant a mortgage on said property so redeemed, pursuant to the order of the Court (pages 145 and 146). And after complainant had loaned the money to the receiver to redeem from said mortgage sale, he refused to accept the mortgage directed to be given by the Court (pages 83 to 84 transcript) and brings this suit, alleging a contract with W. J. D'Arcy, the receiver, and with appellee T. H. Christy, for a first mortgage on the premises, and judgment against the receiver for $2012.76, and that he be subrogated to the rights of the holders under foreclosure sale of the S. J. Rich mortgage. This case was tried at Boise City, Idaho, on July 8th, 1911, before Hon. F. S. Dietrich, Judge, and after due consideration thereof the bill of complaint was dismissed.

ARGUMENT

The complainant and appellant has assigned four errors of the trial Court as follows: 1. That the trial Court erred in refusing to enter judgment against the defendants and in favor of the complainant for the sum of $2012.76, with interest as demanded in the bill of complaint. 2. That the Court erred in refusing to subrogate to all of the rights of the said S. J. Rich under the note and mortgage attached as exhibits "A" and "H" to the bill of complaint, and to reinstate and foreclose said mortgage to satisfy a judgment in favor of the said complaint. 3. That the Court erred in denying complainant a prior lien

upon the real estate described in the bill of complaint to secure payment of the money advanced by him for the purpose of protecting the title to said property from the maturity of the certificate of sale referred to in the bill of complaint. 4. That the Court erred in rendering judgment against the complainant and in favor of the defendants, dismissing the complainant's bill of complaint and rendering judgment in favor of the defendants for costs.

Unfortunately we have not the brief of appellant before us, and consequently are not in a position to follow his argument, but will endeavor to bring our argument under and within the errors as so assigned by him.

The complainant alleges in his bill that he advanced the money, to-wit, $2012.76 for which he is now suing in accordance with an understanding with W. J. D'Arcy, the receiver of the Crystal Springs Investment Company, that the money so advanced should be a loan to the receiver, and was to be secured by a first mortgage upon the real estate described in the bill of complaint. He also alleges in his bill that a petition was filed in the District Court in and for Bingham County, Idaho, that being the Court in which the receiver was acting, asking that the receiver be authorized to borrow a sufficient amount of money to redeem from the foreclosure sale referred to, and that an order was made on said petition by said State Court authorizing the receiver to borrow said amount of money for said purpose (pages 5 and 6 transcript), that both said petition and order are referred to in the bill and marked exhibits "D" and "E" and made a part of the bill.

Complainant further alleges in his bill that he was solicited by the said receiver and by the defendant T. H. Christy, and his predecessors in interest, to ad-

vance the sum of $2500.00 with which to redeem the real estate described in paragraph three of the bill of complaint from the foreclosure sale to S. J. Rich, and that the said receiver contracted and agreed with the complainant that he would give him a first mortgage on the real estate described in the bill, and further alleges that the said T. H. Christy and his predecessors in interest agreed with complainant that his loan would be prior to all other liens, and that pursuant to said agreement the money, to-wit, $2012.76, was by him loaned to the receiver for such purpose (pages 5, 6 and 7 transcript). And complainant further alleges that the receiver failed to execute and deliver to complainant the mortgage upon the said real estate, and that the said T. H. Christy has repudiated his agreement and the agreement of his predecessors in interest that complainant should have a prior and first lien on said premises, in consideration of his loaning the money to the receiver, (pages 7 and 8 transcript), and upon this state of facts the complainant asks to recover in this suit.

The evidence in no way supports the complainant's bill of complaint, nor his contentions thereunder. On the first proposition referring to the order directing the receiver to borrow said money to redeem from said foreclosure sale, which said order is referred to marked exhibit "E" and made a part of the complaint, does not direct that a first mortgage be given but merely directs that the receiver borrow the money and give a mortgage to secure the loan on the property described in the bill and described in the order exhibit "E" (page 22 to 24 transcript). Upon this phase of the case the only inference to be drawn from the allegations of the bill of complaint is that when the complainant loaned the money to the receiver that he expected to be secured in accordance with the provisions and conditions of the order, he had no right to

expect any other or better security and the receiver had no right or authority to give him any other securtiy, and the order only provides that he should have a mortgage.

The evidence upon this point is conclusive, overwhelming, that the receiver has always been ready and willing to give complainant a mortgage upon the premises described in the bill, just what he contracted for. We call the Court's attention to the testimony of W. J. D'Arcy, where he says: "I never have refused to give Mr. Hickenlooper a mortgage as directed by the order of the Court. He never demanded a mortgage of me, if he had I would have given him a mortgage, I would give him one to-morrow or any time if he asks it. I have always been ready to give him a mortgage." (Pages 145 to 146 transcript). Again we call the Court's attention to the testimony of Charles A. Hickenlooper, the complainant himself where he says: "Mr. D'Arcy offered me a mortgage, or a receiver's certificate, just which I wanted." And again he says he does not blame Mr. D'Arcy, that he told Mr. D'Arcy that he would prefer to let the matter rest as it was, that he was satisfied Mr. D'Arcy would give him a mortgage any time he should ask for it. (Page 84 transcript).

We now come to the other question of the pleading above referred to, to-wit, the question of complainant having been solicited to by the receiver and T. H. Christy and his predecessor in interest, to loan the money to the receiver with which to redeem the property in question from the foreclosure sale to S. J. Rich, and to their agreeing with him, appellant, that if he should make the loan that he should have a first mortgage on the premises. We submit that no agreement the receiver might have made to give the appellant a first mortgage would have clothed him

with authority to do so, as the Court's receiver he could only act under and by direction of the Court, and the Court had only directed him to give a mortgage, not a first mortgage, and if he had made such an agreement and there should have been any liability, it would have been a personal liability on his bond as receiver, but if the said Christy had made such an agreemen: whereby appellant was misled to his prejudice, he, Christy, holding a mortgage on the premises as he did, then Christy would probably be bound to take an inferior lien for he would be bound by his contract, and to determine this question we must examine the evidence.

We submit to the Court that there is not a scintilla of evidence in the record to the effect that such an agreement was ever made, or that he was ever solicited to make the loan referred to with the understanding he was to have a first lien, in fact the evidence of appellant himself is to the contrary. On this point we call the Court's attention to the evidence of Mr. T. H. Christy, where he says: He never at any time solicited C. A. Hickenlooper to redeem the property in question from the Sam Rich mortgage. And again he says, that he never had any conversation with him about the redemption of the property until after the property had been redeemed, which conversation was on the 5th day of July, 1909, and that this was the first and only conversation he had ever had up to that time about that mortgage, (pages 123 to 125 transcript). Also call the Court's attention to the evidence of Mr. Charles L. Hart (pages 113-114 and 115 transcript) where he says, he made no agreement whatever with the appellant or any one else with reference to taking second lien on the property mentioned and never solicited appellant to make the loan mentioned. Again Mr. D'Arcy says: He had a conversation with appellant about redeeming the proper-

ty and that he fully understood the matter and that he, D'Arcy, told him that there was no way he could be placed in the same position as the holders of Sam Rich mortgage, that he would have to redeem for them all, that he at no time solicited him to redeem the property or to loan the money with which to redeem it, that he never promised him a first mortgage, but told him he could not give him a first lien, and says at that time appellant told him, the receiver, that he would furnish the money to redeem, as he thought the property was ample security, (pages 135, 136, 137 and 138 transcript).

We again call the Court's attention to the evidence of the complainant and appellant himself on this point where he says: "I was not solicited to make the loan by Mr. Christy, nor Mr. Brown of the Brown-Hart Company, or either of them (page 79 transcript). Again in answer to a question by Mr. Hansbrough after reading as follows: "Your orator further says that he was solicited by the said receiver," (that is Mr. D'Arcy) "and by defendant T. H. Christy, his predecessors in interest, and the stockholders and subsequent lien claimants of the real estate described in paragraph No. 3, to advance the said sum of $2,500.00 with which to redeem said real estate from the sale to S. J. Rich." *Q.* "That is your allegation. Is that true or not true?" *A.* Well, that part of it isn't. I didn't so understand that part of it reading it. Mr. Christy never solicited me, I went to him." (page 77 transcript).

It is clearly shown by the evidence that the complainant and appellant was never solicited by the receiver, T. H. Christy, or any one else, to make the loan for the redemption referred to, and that they, nor either of them, ever contracted or agreed to give him a first mortgage in consideration of his making the loan as alleged in the bill, or at all.

That some conversation was had between the parties regarding the matter, namely, appellant and T. H. Christy and Charles L. Hart of the Brown Hart Company, his predecessor in interest, is shown by the evidence, but the evidence clearly shows that this conversation was had several days after the redemption had been made, and then it shows a positive refusal on the part of Christy and Hart to take a second lien on the property.

We call the Court's attention to the evidence of Mr. T. H. Christy where he says: "I never had any conversation with Mr. Hickenlooper until after it had been reported to me that the property had been redeemed. That conversation was on the 5th day of July, 1909. That was the only conversation I ever had with him in regard to that matter. (Pages 122 and 123 transcript). Again he says: "I returned from the exposition (at Seattle) on Saturday, the 3rd day (July) was at home all day Sunday and saw Mr. Hickenlooper on Monday, the 5th of July, 1909. I got back here on the 3rd day of July, 1909. I left for the exposition on the 21st day of June." Says he was not at Blackfoot from June 21st until July 3rd, 1909, and never had any conversation with Hickenlooper until after his return. (Pages 126, 127 and 128 transcript). Mr. Hart, while he cannot be positive as to dates, says he had one and only one conversation with Hickenlooper about the redemption and one conversation with Christy on the same subject, and that when he went to the bank with Mr. Clegg to see Mr. Christy, he saw and talked with him, this he says was some time about the time the redemption was made. (Pages 129 to 134 transcript).

Mr. Thomas H. Hill, assistant cashier of the First National Bank, says he was in the bank during the absence of Mr. Christy, (the cashier), that he was

there on June 30th, 1909, that Mr. Christy was not there, that he had been absent for two weeks, and returned to Blackfoot on July 3rd, 1909. (Pages 148 and 149 transcript).

Now the evidence of all parties clearly shows that only one conversation between these parties ever took place in reference to this matter, and that Mr. Christy was present, while it is contended by Mr. Hickenlooper that it was on the 30th of June, the day of the redemption, it is still admitted by him that there was only one conversation, that being true, it could not have taken place on June 30th, as Mr. Christy was not in Blackfoot, then it must have been on July 5th, as stated by Mr. Christy. Now we come to what took place the day of the conversation July 5th, 1909, after appellant had advanced the money to redeem. Mr. Christy says, that after his return from the exposition, appellant and Mr. D'Arcy came into the bank and requested that he release the Clegg mortgage and give them a first lien, and intimated that they intended to pay off the judgment known as the Sam Rich judgment, that he informed them that he understood that that judgment had been fully settled, and that appellant said it had not been entirely, that he sent them to the Brown Hart people to talk with them, that an hour or two afterwards Mr. Hart and Mr. Clegg called at the bank and informed him, Christy, that the Rich judgment had been fully paid and satisfied, and he then told them that he would do nothing and that his, Christy's, lien would remain as it was. (Pages 123 and 124 transcript).

We earnestly insist that the evidence clearly shows that no conversation was ever had by the parties with reference to giving appellant a first lien, or lien at all, until the 5th day of July, 1909, after the money had been advanced by him to the receiver and the redemp-

tion made and that his proposition was positively refused.

Appellant pleads an agreement or contract upon which he relies for a recovery in this action and subrogation to the rights of the holder of the certificate of sale under the Rich mortgage.

Appellant has wholly failed to prove the material allegations of his bill of complaint. He is bound by his pleading, and to recover he must prove, the material allegations of his bill of complaint.

Pomeroy on Code Remedies, 4 Ed. Sec. 447 p 613.

When there is a fatal variance between the pleadings and the proof, the bill of complaint should be dismissed.

38 Cyc. Pages, 1563-1564.

Peckinpaugh vs. Lamb. (Kan.) 79 Pac. 673.

Gallandet vs. Kellogg (N. Y.) 31 N. E. 337.

It is a cardinal rule in equity, as in all other pleadings, that the allegata and probata must agree, and that allegations material to the case omitted from the pleadings, cannot be supplied by the evidence.

Murdock vs. Clark	59	Cal.	683
Noonan vs Nunan	76	Cal.	49
Green vs. Covillaud	10	Cal.	317
Clark vs. Phoenix Ins. Co.	36	Cal.	168
McCord vs. Seale	56	Cal.	262-264
Gregory vs. Nelson	41	Cal.	278
Cummings vs. Cummings	75	Cal.	434

Under the rule in equity, plaintiff must prove his

contract as alleged in his complaint, or he is not entitled to recover.

Stout vs. Coffin, 28 Cal. 65
36 Cal. 175

A plaintiff cannot recover upon a cause of action developed by the proofs, but not stated in the complaint.

Burke vs. Levy, 68 Cal. 32

The allegata and probata must correspond in equity, and, however full the proof may be, it is insufficient unless the fact is avered.

Pinney vs. Pinney.
35 So. 95.
46 Fla. 559.

The allegata et probata must correspond in chancery as well as at law.

Robinson vs Morgan.
16 Ky. (Litt. Sel. Cas.) 56.

Relief cannot be granted upon a state of facts disclosed by the evidence, but not alleged in the bill, in the absence of an amendment of the bill so as to make it conform to the facts proven.

Higgins vs. Higgins.
76 N. E. 86.
219 Ill. 146.
109 Am. St. Rep. 316.

A plaintiff cannot file a bill upon one state of facts

and have relief upon another and different state of facts.

Adell vs. Bell.
67 Ill. App. 106.

Harlow vs. Lake Superior Iron Co.
2 N. W. 913.

Evidence of a case not made by the bill, will not support a claim for relief in equity. Proofs must be confined to the issue.

Connerton vs. Miller.
2 N. W. 932.

Relief cannot be given in equity where the case made out by the proofs is different from the case set up in the bill.

Elliott vs. Amazon Ins. Co.
14 N. W. 664.

SUBROGATION

The contention of the appellant in this case at the trial of the case in the lower Court, and we presume will be before this Court from the errors assigned, is that he should be subrogated to the rights of the holder of the certificate of sale under the prior mortgage.

As we view the situation and as we understand the rule in equity, a person asking for equity must do equity, in other words he must come into a Court of equity with clean hands. Appellant's contention having been in the lower Court and being in this Court, that he expected a first lien upon the property and that he advanced the money to the receiver for the

redemption of the property under the former mortgage, expecting to be subrogated to the rights of the holder of the certificate under the prior mortgage, we say is inconsistent with his pleading and the proofs. If he had expected anything at that time, or paid the money with such expectation, he knew it at the time he brought this suit and should have pleaded it. Of course, it is untrue and he could not have sustained such pleading if he had pleaded those facts, because the proof clearly shows that he was relying upon an agreement with the receiver made under and pursuant to the order of the Court, that he should have a mortgage upon the premises to secure him for advancing the money. This, being a fact established clearly by the proof, notwithstanding he pleaded a contract, which he failed to prove.

Now the appellant having entirely abandoned his pleading and the allegations of his bill of complaint is not here asking that the contract and agreement he entered into with the receiver and other defendants, be enforced, and that he be given the security he contracted for or claims to have contracted for, but as suggested in the opinion of the trial Judge, he is asking for a lien which he did not contract for and never expected to receive.

Again, as suggested by the trial Judge in his opinion, (pages 49 and 50 transcript) under the doctrine of equitable assignment or subrogation, he seeks to be put in the place of the mortgagee of the original prior mortgage in disregard of his agreement with the receiver, which was to the effect that he should have a mortgage upon the premises described in the bill of complaint.

Now the question arises, can the appellant be permitted to allege a contract as in this case and as shown

by the evidence here, and totally fail to establish a single allegation of his bill, but by the evidence and his pleading establish a different agreement from that pleaded, and in the face of both the pleading and the agreement established by the evidence, abandon the allegations of his bill and the agreement established by the evidence and ask for and receive different relief? In other words, may he go into a Court of equity and be relieved from proving the material allegations of his bill and also be relieved from a compliance with a contract established by the evidence and have and receive entirely different relief from that contracted for or established by the proof? We think not.

The appellant having contracted for a mortgage on the premises as security for the money advanced, and having failed to prove that he ever contracted for anything different, with any one or that he ever expected to receive anything different, and the evidence clearly showing that the mortgage contracted for has always been and is now available to him, under such circumstances, the doctrine of subrogation will not apply.

As suggested by the trial Judge, "It may be true, if the complainant had entered into an agreement at all with the receiver or any of the parties interested and as a stockholder had advanced to the receiver a sufficient amount to redeem the property, with the expectation of being subrogated, he would be invested with all the rights of the purchaser at the foreclosure sale." Again as suggested by the Court, we say, "That point, however, it is unnecessary to decide. The money was not advanced under such conditions." As before stated, it was advanced under an agreement with the receiver, under and in pursuance to an order of the Court that he should have

a mortgage upon the premises described in the bill to secure the loan to the receiver, and it is perfectly clear from what was done and from the agreement with the receiver for the loan, that the appellant never expected to be subrogated to the rights of the purchaser at the sale.

Again it is clear from the record that the appellant herein is a large stockholder of the corporation, owning approximately $12,000.00 worth of stock (pages 68 to 69 transcript) and also it appears from the record that both of the mortgages mentioned are purchase price mortgages, or amounted to the same thing, the property having been sold to the company in the first instance subject to the prior mortgage in question here and the record showing that the second mortgage was given to Clegg for a part of the purchase price of the property. This being true, it was the moral duty, if not the legal duty, of the appellant as a large stockholder of this company, and he was interested in seeing that these mortgages were paid, because his company had received the benefit of them, and from his act in advancing the money in the way that the evidence shows, he did advance it to the receiver, at the time the loan was made, the presumption is from his act that he realized this and that he had an interest to protect in advancing the money and a duty to perform in seeing that these purchase price mortgages were paid. But afterwards it seems to have occurred to him that there was a chance to defeat the second mortgage, which he is now trying to do.

Another thought occurs to us in this matter, the appellant's counsel laid considerable stress in the lower Court upon the fact that the Crystal Springs Investment Company had gone into the hands of a receiver, which means nothing more nor less than that

by mis-management, presumably, of this corporation, it had been wrecked and from the position occupied by the appellant in this case, the presumption is very strong that he had helped to wreck this corporation. Certainly no one but its stockholders, officers and members could be charged with its condition, and we must bear in mind in this connection that the appellant was a large stock holder, that he must have had something to do with the management and wrecking of this corporation and he should not be heard now to complain of other innocent persons simply because they are seeking to collect their debt from this corporation that has been wrecked and ruined presumably with the knowledge and consent of the appellant himself.

In view of all the evidence in this case and the admissions of the appellant himself, that he has sworn to a bill of complaint, the allegations of which are untrue and that he knew they were untrue when he swore to them, and that none of them are sustained by the evidence but that an entire different state of facts exist from what he alleged, considering his personal interest in the case, the only conclusion to be drawn from all of the facts is that he was a large stockholder in the corporation, that they had failed by mis-management to pay their debts, that the corporation was wrecked and ruined by mis-management presumably, and with the knowledge and consent of the appellant as before stated, and that his only purpose in a Court of equity at this time is to defeat an honest claim, hence we say again that there is no room for the application of the doctrine of equitable assignment or subrogation in this case and that appellant should not be subrogated to the rights of the holder of the certificate of sale of the prior mortgagee.

Another reason occurs to us why he should not be

subrogated and why the doctrine of subrogation should not be invoked in this case. It will be remembered that after loaning the money to the receiver for the purpose of making this redemption, appellant violates his contract himself and refuses to take the security he contracted for and then brings this suit after he had delayed and permitted the holders of the second mortgage to institute proceedings for the foreclosure thereof, and after a decree of foreclosure was entered and the property sold, pursuant to said decree, and after the expense of foreclosure and sale of the second mortgage had all been incurred. It occurs to us that he occupies the position of an interested party whose moral duty at least it was to see that this purchase price mortgage was paid, he having shared in the benefits of it, putting the holder of the second mortgage to all of the expense and trouble that he could and in the end going into a Court of equity and trying to defeat their rights entirely.

Since beginning our brief in this case, we have received a copy of appellant's proposed brief and are pained to note that appellant through his counsel makes an unwarranted and vicious attack upon John W. Jones, attorney for the receiver.

In as much as this is a direct attack upon the attorney in the case by another attorney and is not warranted in any way and is wholly unsupported by any evidence or by anything connected with the case, in our opinion it should not go unnoticed.

In this regard we will say that Mr. Jones has always been the attorney for the receiver and has had nothing whatever to do with the interest of Appellee Christy. He has stood ready at all times under the direction of the receiver to draw up and prepare the mortgage directed to be executed by the order of the Court. We know Mr. Jones to be a gentleman of

high standing, both as a lawyer and a citizen and we know that his actions in this matter have been above reproach as they have always been in other matters.

Permit us to say in comment upon the attack of appellant and his counsel in this case upon Mr. Jones, that as we view the situation from all the circumstances in this case and the condition of the record, appellant and his counsel are not in a position to make any attack upon any one connected with the case. When we consider that the record shows that Mr. Skeen has been the attorney for the complainant from the beginning of this litigation, that he drew the bill of complaint in this case, that his client swore to it, and came into Court under it, and there utterly failed to prove a single material allegation of his bill of complaint and was compelled, as shown by the record, in Court to admit that his bill was absolutely untrue, none of the allegations thereof being supported by the proof, we say again that neither appellant nor his counsel are in a position to charge any one in this case with unfair dealings, especially in view of the fact that there is not a scintilla of evidence in the record to support the charges made in their brief, and the charge of conspiracy against Mr. Jones, the receiver and other defendants in this case, is simply preposterous, and passes comprehension. As we view the matter, it is but another exhibition of the willingness of appellant to say or do almost anything that appears to be necessary to enable him to prevail in this case, without any evidence or reason whatever to support it.

We earnestly submit that in view of all the facts

and circumstances in this case, that the trial Court committed no error, that the decree of dismissal in said cause was proper and that the judgment and decree of the lower Court should be affirmed.

Respectfully submitted,

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RESIDENCE—Blackfoot, Idaho.

This Brief on Appeal is adopted by W. J. D'Arcy, Receiver.

JOHN W. JONES,
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RESIDENCE—Blackfoot, Idaho.